

## CLIENT ALERT

### Court of Appeals Rules That Grand Jury Subpoenas Trump Civil Protective Orders Covering Foreign Documents

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In a terse but important opinion, the Ninth Circuit Court of Appeals has confirmed that foreign documents brought into the United States for purposes of discovery in civil litigation may be obtained by the government through a grand jury subpoena regardless of any civil protective order.

The court's ruling in *In re Grand Jury Subpoenas*, No. 10-15758 (9th Cir. Dec. 7, 2010), reversed a district court's order quashing grand jury subpoenas issued to law firms for defendants and plaintiffs in a multi-district class action suit alleging price-fixing in the LCD industry. The government alleged that the law firms were in possession of documents collected and produced in discovery that are relevant to a grand jury investigation into the same conduct that is the subject of the civil litigation. Finding no evidence of improper collusion with the civil litigators by the government, the Ninth Circuit panel found it appropriate to "apply our per se rule that a grand jury subpoena takes precedence over a civil protective order." The fact that the documents in question were originally located overseas made no difference: "By chance of litigation, the documents have been moved from outside the grasp of the grand jury to within its grasp. No authority forbids the government from closing its grip on what lies within the jurisdiction of the grand jury."

The implications for foreign-based defendants embroiled in U.S. civil litigation are obvious. Assuming personal jurisdiction can be established, foreign defendants in civil suits can be forced to bring documents to the United States or risk sanctions for failure to produce discoverable evidence. Those documents can in turn be obtained by U.S. law enforcement authorities through a grand jury subpoena, regardless of whether the evidence is protected from disclosure by a court order in the civil litigation. This is significant because, unlike civil discovery requests, grand jury subpoenas generally cannot reach evidence located outside the United States, forcing U.S. law enforcement authorities to employ cumbersome processes under a Mutual Legal Assistance Treaty or letters rogatory. An important caveat, which was alluded to in the Ninth Circuit's opinion in *In re Grand Jury Subpoenas*, is that the government may not act in bad faith by colluding with litigants to surreptitiously direct the course of civil discovery in order to procure foreign evidence.

Foreign-based defendants involved in parallel civil and criminal proceedings in the United States will have to take these dynamics into account when producing overseas documents that would otherwise be beyond the reach of U.S. law enforcement subpoenas.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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